AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

INTELLIGENCE REPORT

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Congressional Actions Affecting Intelligence

The 97th Congress convened on January 5, 1981 for the swearing-in of members, met on January 6 for the counting of electoral votes, and then recessed until January 19. Confirmation hearings for President-Elect Reagan's Cabinet appointments began on January 6. William Casey appeared on January 13 before the Senate Intelligence Committee for confirmation as Director of the Central Intelligence Agency. William French Smith appeared before the Senate Judiciary Committee on January 15 for his nomination as Attorney General.

Standing Committee News

Morris I. Leibman, Chairman of the Standing Committee, is recuperating in Florida from his recent heart attack. He is doing exceptionally well and would like to thank everyone for their prayers, wishes, letters and cards.

A Review of Standing Committee Activities During 1980

ABA Actions on FBI Charter and Graymail Legislation

The Mid-Year meeting of the American Bar Association took place on Monday and Tuesday, February 4 and 5, 1980. After an hour and a half of debate led by Chairman Leibman and Committee Consultants Antonin Scalia and Earl Silbert, the House of Delegates adopted recommendations relating to the FBI Charter and Graymail legislation. In both cases virtually all of the recommendations of the Standing Committee on Law and National Security to the House were adopted.

FBI Charter Legislation

As reported in the January newsletter, the Standing Committee had six positive proposals. Five of these were adopted by the ABA as proposed. The sixth (Recommendation Number 5 dealing with dissemination of information) was adopted in substance but with slight alteration in wording.

Graymail Legislation

Prior to the Mid-Year Meeting, Professor William Greenhalgh and Laurie Robinson of the Criminal Justice Section met with Earl Silbert, consultant to the Standing Committee, to attempt to reduce the differences between the two. The result was a draft joint proposal which incorporated all the major recommendations of the Standing Committee on Law and National Security. This joint draft proposal was subsequently approved by both the Committee and the Criminal Justice Section. It was then submitted to the House of Delegates which accepted it completely except for, by motion on the floor, permitting the defendant as well as the United States to have the right of interlocutory appeal from an adverse ruling by the trial judge. This change did not have the support of either the Standing Committee or the Criminal Justice Section nor was it contained in any of the various legislative proposals before the Congress.

Mr. Silbert's report was on request submitted to the House Intelligence Committee and to the Criminal Justice Subcommittee, Senate Judiciary. In addition, Mr. Silbert testified before the latter committee on February 7, 1980 in a panel with Professor Greenhalgh from the Criminal Justice Section. They made an unofficial report to the Committee of the action taken by the ABA House of Delegates.

Cont'd. on page 5

INSIDE

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General Aharon Yariv

Interview with Florence Bank
December 31, 1980
Tel Aviv, Israel

Major General (Res.) Aharon Yariv is presently the Head of the Center for Strategic Studies, established at Tel Aviv University in 1977. Previous to this, he had a distinguished career both in the military and in government service to the State of Israel. During his Israeli army experience, General Yariv held various staff and command apointments, including that of Director of Military Intelligence from 1964-1972. Before that he was the Commander of the Golani Infantry Brigade as well as Military Attache in Washington, D.C. Following his retirement from the army in 1973, he served as Advisor on Terrorism to then Prime Minister Golda Meir and as Special Assistant to the Chief of Staff during the 1973 Yom Kippur War. He also led the Israeli delegation to the "Km 101 Cease Fire Talks" with the Egyptians. In 1974, General Yariv was elected to the Knesset (Parliament) where he served as Minister of Transportation and Minister of Information.

General Yariv discussed various aspects of Israeli and U.S. intelligence. The General asserted that intelligence is first and foremost people. He advised that the morale and performance of the U.S. intelligence community would improve when these people are convinced that they are "*needed, wanted*, and *respected*." He added this result is only probable under "the best possible leadership available."

General Yariv advised that oversight exists in Israel in the Subcommittee for Intelligence Oversight (to which he is an advisor). This subcommittee may request information about intelligence operations and regularly receives extensive written reports from the heads of the intelligence branches. However, "what they are not told is so sensitive that it is better not to know about it." Moreover, when questioned about the timeliness of this notification and whether there is "advance notification," the General responded that the Israeli attitude is more realistic towards "the need to know" principle. He advocated the continuation of "well balanced" U.S. congressional oversight; however, he felt one joint select committee would be preferable. He emphasized that a strong intelligence service must operate with freedom under the close scrutiny and approval of the President to whom it is responsible and whom it serves. He would not comment on whether cooperation between Israel and U.S. intelligence has suffered due to fear of leaks within Congress, but he strongly urged the U.S. to criminalize disclosure of the identity of its intelligence agents. He stressed that the publication of names and addresses of agents was more incredible than any Israeli citizen could understand.

Yariv explained that there are in Israel and should be anywhere "certain written instructions" by the Executive defining what the intelligence community can and cannot do. He further stated there must be a clear definition of what the Director of Intelligence may and may not do. He did not believe, however, that the U.S. should establish a separate director of national intelligence because, "there must be a man *with a horse*, not only a chair ... there must be one boss with overall responsibility ...." He felt perhaps a presidential advisor on intelligence could offer the Reagan Administration additional views. He emphasized that, "Good men, men with mutual respect and confidence in each other, and a clear delineation of responsibility" would result in a stronger U.S. intelligence product for the Reagan White House.

The General described the three branches of Israeli intelligence: Shin Bet, Mossad, and Military Intelligence. He equated Shin Bet to the FBI since its jurisdiction is domestic, non-military intelligence operations for internal security and counterintelligence. Mossad, like the CIA, is involved in international intelligence operations and is headed by the "Chairman of the Committee of Heads of the Intelligence Services." Military Intelligence (most like the DIA) is responsible for political, economic and strategic operations, but only from within the borders of Israel. Of the three, Shin Bet and Mossad are subordinate directly to the Prime Minister, while Military Intelligence is under the Chief of Staff.

General Yariv suggested that "top notch intelligence should be put in place as soon as possible" in the Persian Gulf by the NATO community to anticipate trouble. A significant, impressive NATO presence in the Persian Gulf will convey a vital message that is urgently needed in the area. Although General Yariv was asked to delve deeper into questions concerning terrorism, the PLO, Soviet involvement and the cooperation between U.S. and Israeli intelligence, he felt it was not possible for him to comment on these subjects. He concluded the conversation with a modest recommendation about the hostage situation. He advised the Reagan Administration to be patient, let the headlines die away, and then begin quiet negotiations with Iran. However, smiling broadly, he added, that such a small country like Israel could not offer advice to such a large country like the United States.

St. Louis Law Professor Workshop

The Standing Committee and the International Law Section, together with the Saint Louis University School of Law, co-sponsored a Law Professor Workshop, "The Economic Aspects of National Security and Foreign Policy: The Challenge to a Free Enterprise Society," December 12-13, 1980, at St. Louis, Missouri. More than 95 law professors and members of the Bar attended the Workshop, which included presentations by former Secretary of State Dean Rusk; Ambassador Robert D. Hormats, Deputy U.S. Trade Representative; and Congressman Clement J. Zablocki.

The specific thrust of the program was that there are institutional limitations on the right of the U.S. Government to harness fully the private sector to serve national security and foreign policy interests, and, reciprocally, the private sector cannot be assured of the desired level of governmental support to facilitate its international dealings. The challenge posed was how to accommodate governmental and private sector needs without upsetting the extant institutional balance.

The inability to harness completely the private sector to policy objectives was noted as a special problem for the United States in coping with these economic aspects. As in

other areas (e.g., intelligence), the U.S. pays a price for its domestic institutions which tend to protect private interests from undue interference by government and, thereby, the amount of harnessing possible. It is the old story of democracy: public vs. private interests—where to draw the line?

—by Bernard A. Ramundo

Felt-Miller Conviction

Court Decision

On November 6, 1980, following an eight week trial, which ended in their felony conviction for conspiring in 1972-73 to authorize surreptitious entries into the residences of friends and relatives of members of the radical Weatherman organization, two former high FBI officials, W. Mark Felt and Edward H. Miller were sentenced on December 15, 1980 by Chief Judge William B. Bryant of the U.S. District Court for the District of Columbia to pay fines of $5,000 and $3,500 respectively. Felt and Miller could each have been sentenced to ten years imprisonment, a fine of $10,000 or both. Lawyers for the defendants indicated their intention to appeal the convictions.

The indictment in the related case against L. Patrick Gray, the Acting Director of the FBI at the time that covert entries involved in the Felt/Miller case were undertaken, was dismissed a few days prior to the sentencing. None of the FBI agents who actually performed the entries were prosecuted. Bernadine Dohrn, one of the objects of the intelligence gathering effort during which the "black bag jobs" were instituted, surfaced about two weeks prior to the sentencing after almost a decade in hiding.

Historical Background

Of interest to the intelligence community, the public trial record in the case revealed that, beginning in the late 1930's for approximately thirty years the FBI, on the authority of Director Hoover, conducted surreptitious entries, that is, searches of private premises without a warrant for the purpose of photographing documents in matters relating to the national security and public safety. These searches were thought permissible because they were for the purpose of gathering *intelligence* information and not for the purpose of gathering evidence to be used in law enforcement. Although each entry was undertaken on the authority of the Director or his Associate Director, Presidents, Attorneys General and other officials in the Department of Justice were aware of this practice by the FBI. Indeed, it was widely known among Justice Department attorneys dealing with internal security matters. Former Attorney General Herbert Brownell testified that Mr. Hoover authorized the searches on authority delegated to the Office of the FBI Director by the Office of the President.

The targets of the searches under Director Hoover included, among others, Nazi and Soviet spies, Communist Party members and the Ku Klux Klan. In 1966, apparently because of a growing distrust between Director Hoover and the Johnson Administration's Justice Department and a third agency involved in intelligence gathering for whom the FBI undertook surreptitious entries, Mr. Hoover determined that no further surreptitious entries would be authorized. Upon becoming Attorney General, John Mitchell was advised by Mr. Hoover that the FBI had engaged in the intelligence gathering technique of surreptitious entry in the past but no longer utilized the technique. President Nixon attempted to direct Mr. Hoover to resume the practice in national security cases and in other important matters. The former President testified during the trial that it was his understanding that the Presidential authority to conduct surreptitious entries to gather intelligence in matters relating to the national security had been delegated to the Director of the FBI and thus had been vested in that office for years. President Nixon testified that he did nothing to withdraw that authority and his only concern was Mr. Hoover's reluctance to use it.

Felt-Miller Activities

After Mr. Hoover's death, L. Patrick Gray was nominated Director of the FBI and assumed the position of Acting Director in May, 1972. According to trial testimony, he began to study use of discarded intelligence gathering techniques, including surreptitious entry. In September of 1972, he approved the use of a surreptitious entry in a matter involving suspected acts of terrorism by the Black September group (Al Fatah) operating in conjunction with other groups within the United States, among them it was suspected, the Black Panthers and the Weathermen. Based on remarks allegedly made by Mr. Gray at this time, and the fact that Mr. Gray had been appointed by President Nixon who was known to have been dissatisfied with Mr. Hoover's reluctance to use surreptitious entry, Messrs. Felt and Miller, according to evidence introduced by the defense, came to believe that Mr. Hoover's 1966 termination of the use of surreptitious entries had been withdrawn, at least in matters where the national security or potential acts of terrorism by foreign influenced groups were concerned. Thirteen entries were accordingly authorized by Mr. Felt who then occupied the same position in the chain of FBI command which Mr. Hoover's Assistant Director had occupied.

Of the thirteen entries authorized by Mr. Felt and Mr. Miller, six were directed against friends, associates and relatives of members of the radical Weather Underground. The purpose of the entries was to gather information concerning the clandestine communications system of the Underground and to locate its key leaders, many of whom were fugitives, in order to prevent future terrorist acts. The FBI was in possession of intelligence from its own sources and from other agencies to the effect that the Weather Underground had received training in guerrilla warfare and explosives from Cuban Intelligence (DGI) and Soviet Intelligence (KGB). At the time, the Weather Underground had been implicated in numerous terrorist acts, that is, bombings, involving loss of life, injury and extensive property damage to public institutions, apparently undertaken in order to create the impression of widespread outrage and frustration among American youth at the slow pace of the Paris Peace Talks and it was believed that these acts would continue. These

acts complemented the view then held by Hanoi and by the Viet Cong that the more impatient the American public appeared along with a break-down of order within the United States itself, the more favorable the terms of any settlement would be to the communists. The government chose to indict Messrs. Felt and Miller and Gray on a conspiracy charge which involved only the six Weather Underground entries.

The prosecution commenced in April of 1978. The jury verdict was returned in November of 1980. The intervening two and one-half years were spent attempting to "sanitize" national security information from the many documents related to the case. This was done through an elaborate process of censoring the documents, using stipulations in lieu of documents, and, in some instances creating fictitious documents which would supposedly have the same purport as the originals but which would not cause a security breach. The process was lengthy and tedious, but it was the only way defense counsel were permitted to obtain the evidence felt necessary to put on a defense.

Issues on Appeal

On appeal, three issues of relevance to the case are likely to be raised. First, at the request of the prosecution, the Court entered an order which prohibited the defendants and witnesses from saying certain things for national security reasons. Since the jury's verdict hinged in part on its perception of the defendants' state of mind, the impact of this order on the presentation of the defense is likely to be of import for purposes of an appeal.

Second, during the period charged in the indictment, there were no guidelines, court decisions, or statutes relating to national security surreptitious entries for intelligence purposes. It now appears that such operations are legal and Constitutional if a particular entry is approved in advance by either the President or the Attorney General. The defendants did not seek the specific approval of either of these officials because such had never been thought necessary in the past and, at the time they acted, there was nothing to suggest such personal approval was required. The lack of a known and clear standard at the time of the offense raises the question whether the prosecution was fair. During the trial, a standard announced four years after the conduct complained of was applied retroactively to these defendants.

Third, the trial judge's instruction limited the scope of warrantless intelligence searches where the activities of foreign powers are involved strictly to premises where the owner or occupier of the premises has a significant foreign connection. The judge's charge, in pertinent part, was:

> The individuals whose home or apartment or premise is to be searched must have a significant connection with a foreign power, its agents or agencies. This means that you must find that [certain named friends and relatives of members of the Weatherman organization] all had a significant connection with a foreign power, its agents or agencies. By "significant connection" I mean acting in collaboration with or as an agent for, a foreign country....

This charge limited the scope of warrantless intelligence searches. During the trial, the defendants contended that it need only be shown that there is reasonable cause to believe information is on the target premises that would be of value in a pre-defined foreign intelligence investigation. The charge given appears contrary to a Supreme Court decision in an analogous situation. As recently as 1978, the Court noted that a critical element of a "reasonable" search within the meaning of the Fourth Amendment is probable cause to believe that the material or things to be searched for are located on the premises to which entry is sought. The culpability or non-culpability of the owner or occupier of the premises is apparently not of Constitutional consequence. *Zurcher v. The Stanford Daily*, 436 U.S. 547 (1978).

Authority which tends to support the instructions given by the Court is President Carter's 1978 Executive Order No. 12036, which limits the use of warrantless intrusive intelligence collection techniques directed against U.S. citizens to situations where the person involved is thought to be an agent of a foreign power. Significantly, however, in legislative proposals made by the Carter Administration in 1980, this position was modified so as to permit the use of such techniques against "innocent" U.S. citizens, at least abroad.

Regardless of the eventual outcome of the case, it is likely that in appellate opinions as yet unwritten, a significant amount of law will be stated with considerable impact to the intelligence community. It seems ironic that just as the Congress is about to grapple with the same issues raised in "charter" type legislation, it can be anticipated that the Judiciary will discuss the issues within the narrow confines of a criminal case, thereby foreclosing public debate of these important issues as they affect the practices of the intelligence community.

Secrecy Agreements Guidelines

On December 13, 1980, the Department of Justice issued a new set of guidelines for suits against current and former government employees who break secrecy agreements with the CIA and other intelligence agencies. The guidelines contain a statement that the political content of the material or the motivations of the individual be ignored in any decision to file suit. The guidelines had been prepared at the direct order of Attorney General Benjamin Civiletti, following the Supreme Court Snepp decision upholding the government's right to sue in cases where secrecy agreements are breached.

The guidelines make it clear that all current and former government employees are to be treated equally in any department decision to sue. It specifies that the government is only to sue if the employee has signed an agreement requiring clearance before disclosure of the classified or classifiable material. The guidelines also include a warning that any decision to seek a court injunction barring publication of the material would be viewed as "an extraordinarily serious matter that should be undertaken after the most searching scrutiny of the strength of the government's case."

While the guidelines are not binding on the Reagan Administration, it is reported that incoming Attorney General William French Smith is expected to follow them.

Standing Committee, 1980

continued from page 1

CSIS

On March 25th, a statement of tribute to Morris I. Leibman from the Center for Strategic and International Studies, Georgetown University, was read in the House of Representatives by Congressman Robert McClory (R-Ill.) of the Permanent Select Committee on Intelligence.

S.2284

Committee consultant Raymond J. Waldmannn testified before the Senate Select Committee on Intelligence on S.2284, the National Intelligence Act of 1980, on March 27th. While testifying on his own behalf, he advised the Committee of the formation of an Advisory Group within the Standing Committee on Intelligence Legislation. In his statement, he warned "...about the direct involvement of Congress in the management of executive agencies. Congress should concern itself with authorizations, restrictions and procedures. The writing of detailed rules and regulations is more appropriate for an administrative agency for its own operations. Congressional oversight provides the necessary check. The history of the last 30 years has demonstrated that no detailed administrative legislative charter has been required to conduct the necessary operations of the intelligence community."

Longboat Key Meeting

The Standing Committee on Law and National Security met in Longboat Key, Florida on April 17, 18 and 19 to review its present and future activities. Among the many issues discussed were the draft report on the CIA charter as prepared by the Charter Advisory Group, chaired by Committee Consultant Waldmann, the Conference to be held at the University of Chicago Law School in June, the Portland and University of St. Louis Conferences, and future intelligence-related projects.

CIA Charter

Committee Consultants Scalia and Waldmann, accompanied by Axel Kleiboemer, presented a summary of the Charter Advisory Group's consideration of the CIA charter legislation before a meeting of the Council of the ABA Section of Individual Rights and Responsibility in Washington on April 25th.

This presentation focused on the need for balance in legislating intelligence charters, the complexities of the present legislation and the differences between the FBI charter, on which the Section had already taken a position, and the intelligence charters, where national security issues and positive intelligence collection are more important considerations than collection of evidence for criminal prosecution. As a result of the presentations, the Section's Council deferred action on a draft resolution and instead called for a thorough review of the issues by the ABA.

On May 6, 1980, Raymond J. Waldmann, Chairman of the Standing Committee's Advisory Group on intelligence legislation, circulated to the Committee a 76 page discussion draft analysis of legislative proposals for a comprehensive intelligence community charter.

The analysis considered Senator Huddleston's Bill (S.2284), Senator Moynihan's proposal (S.2216), and Representative Aspin's Bill (H.R. 6820), as well as various Administration and committee redrafts of the basic three proposals. Insofar as legislative proposals made mention of them, the draft analysis contains a detailed discussion, in the framework of present law, of the following issues raised by the legislative proposals: intelligence collection techniques; Hughes-Ryan reporting and authorization of special activities; explicit prohibitions and restrictions on intelligence agencies; proposed Freedom of Information Act changes; protection of agents' identities; and proposals for sanctions against intelligence community members. It is anticipated that the matters considered in the draft report will be the subject of action in the next Congress.

Portland Law Professor Workshop

Committee Consultant Bernard Ramundo organized the Law Professor Workshop "National Security and Foreign Policy Issues in the Eighties," held on June 6-7, 1980 in cooperation with Willamette University's College of Law. The Workshop was the sixth in a program series to enrich the legal educational process through the Association's sponsorship, in cooperation with hosting law schools, of seminars on contemporary national and international security affairs problems. Attended by approximately 110 law professors, the overall Workshop objective was to compress in a two-day session an exposure to some of the critical national security and foreign policy issues which are anticipated to be in the fore during the decade of the eighties.

Agents' Identities

On June 25th, Committee Consultant Raymond J. Waldmann testified before the Senate Intelligence Committee on the protection of agents' identities. In his prepared remarks, he advised, "...The difficulty in this area is not in deciding what to do, but in deciding where to stop. Legislation in the area will be regarded by some as potentially eroding the First Amendment protection of free speech, and therefore it must be carefully drawn. It must be sufficiently narrow and precise to withstand Constitutional challenge, yet broad enough to deter unacceptable acts and general enough to allow for unforeseen situations and circumstances."

Conference on Intelligence Legislation

The Standing Committee conducted a two-day conference on intelligence legislation at the University of Chicago Law School on June 27 and 28. This conference, chaired by Committee Chairman Leibman and Dean Casper, brought together many outstanding experts from

government, academia, and the private sector who examined current legislative proposals affecting the intelligence community. A transcript of the conference has been prepared for publication by the Standing Committee.

Among the featured speakers were CIA Deputy Director Frank Carlucci, University of Chicago Law School Dean Casper, John O. Marsh, Senate Intelligence Committee Staff Director William Miller, DOJ Counsel for Intelligence Policy Ken Bass, Professor Roy Godson, Former Attorney General Edward Levi, Morton Halperin of the Center for National Security Studies, FBI Director William Webster, Congressman Romano Mazzoli, University of Virginia Law Professor Ernest Gellhorn, CIA Legislative Counsel Frederick Hitz, *New York Times* Counsel Floyd Abrams, CIA General Counsel Daniel Silver, Senate Intelligence Committee Staff Member Angelo Codevilla, and Director Frank Barnett of the National Strategy Information Center.

Bork Statement

On September 2nd, Yale University Law Professor and Standing Committee member Robert Bork submitted a statement to Peter W. Rodino, Chairman of the House Judiciary Committee, in support of the passage of the Intelligence Identities Protection Act of 1980.

In this letter he addressed the Constitutionality of the most troublesome provision of the two agent identities bills, Section 501(c). It concluded that "... the class of individuals liable under either bill is sufficiently narrow to survive a Constitutional challenge. In addition, the type of information which is protected is of the type which deserves, and in fact requires, statutory protection, based on a significant Congressional finding of need. Finally, I believe that the scope of the bills, limiting the application to republication or isolated incidents, is consistent with the Constitutional mandates of the First Amendment in this area. Thus, I urge the Congress to give serious consideration to the inclusion of Section 501(c) in a reported bill."

Leibman Speech

Morris Leibman, Chairman of the Standing Committee, addressed the Naval Order of the United States on September 18, 1980 in Chicago. The subject of his speech was "The Soviet Threat to the U.S. Intelligence Community."

Shevchenko

Ambassador Arkady N. Shevchenko granted his first interview to a U.S. publication. Ambassador Shevchenko was interviewed by the editors Raymond J. Waldmann and Florence Bank, and by David Martin, in the office of Ambassador Shevchenko's attorney, William Geimer, on September 25, 1980. The interview was reproduced in its entirety in the October and November newsletters, and was read into the Congressional Record of November 19th.

Cyrus Vance

The Honorable Cyrus Vance, former Secretary of State, has again become Counsellor to the Standing Committee on Law and National Security.

Senate Select Committee on Intelligence

Barry Goldwater, Ariz.; Chairman

Majority
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Richard Lugar, Ind.
Malcolm Wallop, Wyo.
David Durenberger, Minn.
William Roth, Del.
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Walter Huddleston, Ky.
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Daniel Inouye, Hawaii
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John Blake, Staff Director